UNITED STATES DISTRICT COURT

DISTRICT OF RHODE ISLAND

George Guindon, et al.	:	
vs.	:	C.A. No. 03-335 L
American Foam, et al.	:	

STATE OF RHODE ISLAND AND IRVING J. OWENS' MOTION FOR CERTIFICATION AND SUBSTITUTION PURSUANT TO R.I. Gen. Laws § 9-31-12

Defendants State of Rhode Island and Irving J. Owens hereby Move this Honorable Court to Substitute the State of Rhode Island in this action for Irving J. Owens pursuant to R.I. Gen. Laws § 9-31-12.

Respectfully submitted,

DEFENDANTS

By Their Attorney,

PATRICK C. LYNCH
ATTORNEY GENERAL

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Assistant Attorney General
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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 1st day of September, 2004, a copy of the within was mailed, via regular mail, postage prepaid, to the certification list.

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UNITED STATES DISTRICT COURT

DISTRICT OF RHODE ISLAND

GEORGE GUINDON, et al.	:	
vs.	:	C.A. No. 03-335 L
AMERICAN FOAM, et al.	:	

MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR CERTIFICATION AND SUBSTITUTION PURSUANT TO R.I. Gen. Laws § 9-31-12

I. INTRODUCTION

Although the State of Rhode Island and Irving J. Owens urge that their Motion to Dismiss be granted in full, if for any reason it is not granted the State moves this Honorable Court for an Order removing Irving J. Owens from this case in all capacities pursuant to R.I. Gen. Laws § 9-31-12, which allows substitution of the State of Rhode Island as the party Defendant in this civil action.

IV. APPLICABLE STATUTE

In the 1995 session, the General Assembly enacted the following change to R.I. Gen. Laws § 9-31-1, et seq., the so-called State Tort Claims Act:

> Upon certification by the Court in which the tort action against a state employee is pending that (1) the defendant employee was acting within the scope of his or her office or employment when the claim arose and (2) the claim does not arise out of actual fraud, willful misconduct or actual malice by the employee, any civil action or proceeding commenced upon such claim under this statute shall be deemed to be an action or proceeding brought against the state under the provisions of this title and all references thereto, and the state shall be substituted as the party defendant.

R.I. Gen. Laws § 9-31-12(b), 1995 P.L. ch. 45, § 1. See copy attached.

Pursuant to this statutory section, and as an alternative to their Motion to Dismiss, Defendants State and Owens request that the State of Rhode Island be substituted as the party Defendant for Fire Marshal Irving J. Owens.

V. ARGUMENT

Since Plaintiff's Complaint sounds in tort, the Tort Claims Act, R.I. Gen. Laws § 9-31-1, et seq., is applicable. Defendant Owens asserts that the acts complained of were all within the course and scope of his State employment as the Fire Marshal.

Accordingly, the State of Rhode Island, by and through the Attorney General, asserts that Defendant Owens "was acting within the scope of his office or employment when the claim arose" and that "the claim does not arise out of actual fraud, willful misconduct or actual malice by the employee." See R.I. Gen. Laws § 9-31-12. Therefore, Defendants State and Owens respectfully request that if their Motion to Dismiss is not granted at this time, the Honorable Court grant this request for Substitution of the State of Rhode Island as the party Defendant in this civil action.

V. CONCLUSION

For the reasons set forth herein and pursuant to R.I. Gen. Laws § 9-31-12, Defendant Owens respectfully request that the State of Rhode Island be substituted as the party Defendant in this civil action if his Motion to Dismiss is not granted at this time.

Respectfully submitted,

DEFENDANTS STATE OF RHODE ISLAND
AND IRVING J. OWENS

By Their Attorney,

PATRICK C. LYNCH
ATTORNEY GENERAL

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